FILED
AUG 2 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1532

IN THE

Supreme Court of the United States

KEVIN ADELL,

Petitioner,

v.

JOHN RICHARDS HOMES BUILDING COMPANY, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court grant certiorari where (i) the record in this case is that respondent's claims for damages were established factually by evidence other than hearsay testimony of an expert and (ii) the claimed conflict among the courts of appeals about the admissibility of hearsay testimony by an expert does not exist anyway?

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner is Kevin Adell, an individual. The Respondent is John Richards Homes Building Company, L.L.C., a limited liability company.

John Richards Homes, LLC is the sole member of John Richards Homes Building Company, LLC.

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PRELIMINARY STATEMENT

This matter arises out of the involuntary bankruptcy case of respondent John Richards Homes Building Company, LLC (JRH), which was commenced by petitioner Kevin Adell (Adell) on June 24, 2002 pursuant to section 303(b) of the Bankruptcy Code. 11 U.S.C. § 303(b). JRH was and is in the business of constructing homes.

Adell contracted with JRH to purchase land from JRH and to have JRH build his home on the land. In purchase documents, Adell swore to the accuracy of the allocation of the total price of $3,030,000 as between the land he was buying and the home JRH was building for him, Apx. 0710[1], but then later claimed that JRH had cheated him by overcharging him for the land. Apx. 0719. Before he made that claim, he had fired JRH from the job site because he professed to be angry about water which was accumulating on the property (even though the property was easily dewatered and there was nothing unusual about the water accumulation) and told JRH that he was going to have his brother-in-law build his home for him instead. Apx. 0652-0654. He sued JRH and its principal in state court, claiming that he had been cheated (Apx. 0719); JRH denied the allegations of liability in an answer (Apx. 0747) and countersued for breach of contract in state court (Apx. 0765); and then, after JRH had both filed an answer denying liability in that state court proceeding and counterclaimed against Adell for breach of contract, Adell filed an involuntary bankruptcy petition, attesting under penalty of perjury that he had an undisputed debt of $800,000 which was owed to him by JRH. Apx. 0028.

On a highly factual record, the Bankruptcy Court, in an opinion reported at 291 B.R. 727, found, among other things, that Adell — who told JRH's principal that he was worth

1. References to (Apx. __) are to the Appendix filed in the Sixth Circuit.

hundreds of millions of dollars and that he had once been given a hard time by a village in which he wanted to build a home, so that he built "the ugliest home he could possibly think of just to piss them off," Apx. 0661, 291 B.R. at 733 — (a) specifically filed his involuntary petition for the purpose of harming JRH's reputation, asking JRH's principal and counsel, at a pre-petition filing meeting, "Can the company take the hit to its reputation if an involuntary bankruptcy [is] filed?", 291 B.R. at 732, Apx. 0469-0470; (b) hired a publicist, who contacted the major Detroit area media, to publicize the bankruptcy filing, 291 B.R. at 732, Apx. 0820, 0834, 0836 — this before the Court had even determined, as 11 U.S.C. § 303 contemplates will take place after a hearing, whether the case was even suitable for involuntary bankruptcy treatment;[2] (c) provided false information to the publicist that JRH had provided "payoffs" to creditors to avoid the filing of the petition, which was repeated by the publicist to the media, 291 B.R. at 732, Apx. 0834, 0836; (d) gave the publicist the names of nine customers whom he falsely claimed were dissatisfied with JRH's work for newspapers to contact, 291 B.R. at 732, Apx. 0834, 0836, two of whom testified at trial that they were not in any way dissatisfied (and none of whom testified that they were), 291 B.R. at 732, Apx. 0984-0989; (e) threatened criminal prosecution of JRH in a letter written by his counsel if JRH did not refund his money in full, plus discharge the mortgage on his property and pay his attorney fees, 291 B.R. at 733, Apx. 0813; (f) boasted of being worth hundreds of millions of dollars and of being a very rich man, 291 B.R. at 733, Apx. 0499, Apx. 0656; (g) threatened a trade creditor of JRH, Robert Clark, that if he did not join in the involuntary petition, he would see to it that the trade creditor would not be paid, 291 B.R. at 733, Apx.

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2. *See* 11 U.S.C. § 303(h)("after trial, the court shall order relief against the debtor in an involuntary case under the chapter ...").

0527-0528 — a violation of 18 U.S.C. § 152; (h) told another trade creditor of JRH, Cynthia Weaver of EW Kitchens, that if she joined in the involuntary filing, it would not cost her anything to do so, 291 B.R. at 733, Apx. 0500 — another violation of 18 U.S.C. § 152, (i) concealed from the bankruptcy lawyers who filed his involuntary petition at his request that JRH had, in state court, already filed an answer denying the material allegations of liability and had filed a counterclaim for breach of contract, 291 B.R. at 734, Apx. 0945, instead insisting — as he swore in his petition — that the debt was undisputed, and concealed from those bankruptcy lawyers that JRH's counsel had written Adell's other lawyer who had threatened JRH with criminal prosecution that the claimed debt was hotly disputed and that the effect of filing the involuntary bankruptcy petition would be severely to harm JRH's business, 291 B.R. at 734, Apx. 0944, Apx. 0815, Apx. 0817, Apx. 0819; and (j) falsely testified that he filed his involuntary petition out of concern for creditors — at least one of whom he threatened that he would make sure would not be paid if the creditor did not join in the petition.

The evidence regarding JRH's damages was equally fact-intensive. JRH offered testimony of John Shekerjian, the principal of JRH; David Johnson, a longtime builder of super-lux homes in the metropolitan Detroit market; and Thomas Frazee, a financial analyst and expert. All testified that the filing of the bankruptcy petition had harmed JRH's ability to sell homes in a dramatic way. Contrary to Adell's claim in his petition that JRH's damages were based solely on Frazee's expert testimony, the Bankruptcy Court found as a matter of fact that Frazee's conclusions "were supported by other credible evidence." 291 B.R. at 736. In particular, Shekerjian had personally reviewed and agreed with Frazee's calculations and

conclusions as to the damages JRH's business would suffer for five years by virtue of the filing of the petition (indeed, he believed they were conservative, Apx. 0634-0640); that JRH would lose approximately half of its home sales because of the harm to reputation associated with the involuntary bankruptcy filing; and that the profit margin on lost future sales would be 17%, which was consistent with the historical experience of JRH and its affiliates, Apx. 0635).

Shekerjian, who had been in the real estate business for approximately 20 years (Apx. 0623) and was thus qualified to have personal knowledge to testify about the margins that had been enjoyed historically and what the future would hold, testified that JRH had been created as the entity to sell high-end homes (with a price point north of $1,000,000) in January, 2001, Apx. 0623; that prior to that time, homes of this type had been sold by a number of affiliates of JRH, but that the decision had been made to concentrate sales of these homes in one company because the marketing of these homes is different from homes at other price points, Apx. 0624-0625; that the affiliated entities had sold approximately 40 homes at this price point in the five years prior to his testimony, Apx. 0626; that neither JRH nor any other affiliated entity had made a home sale in this price range since the filing of the involuntary bankruptcy petition, 291 B.R. at 735, Apx. 0627; that this was so because reputation is paramount to customers building these kinds of homes, and no one wants to purchase a home from an entity that might be going out of business because of bankruptcy, 291 B.R. at 735, Apx. 0632-0633; that there were two specified, identified customers who were in the middle of negotiations to purchase homes who broke off negotiations, one of whom cited the filing as his reason, 291 B.R. at 735, Apx. 0628-0631; that the anticipated profit margin for the sale of the particular homes calculated by Mr. Frazee was consistent with his personal

understanding of what the margins would have been, and that JRH had provided Frazee with the anticipated budgets for the homes to do these calculations, Apx. 0631; that Mr. Frazee's methodology of using the volume of sales of JRH's affiliated entities was a reasonable means of calculating what JRH's sales would have been in the future but for the filing of the petition — indeed, Mr. Shekerjian said he would know of no other way of doing so, Apx. 0634; that the 17 percent margin which Mr. Frazee calculated would have been earned on lost future sales was consistent with Mr. Shekerjian's own experience in dealing with these kinds of home sales and reasonable to predict what would have happened in the future but for the filing because it was based on "historical information," Apx. 0635; that Mr. Shekerjian's conclusion that Mr. Frazee's analysis was correct was informed by "20 years in the business and understanding what our margins would be," Apx. 0635; and that Mr. Frazee's calculation that home sales would be affected for only five years and that only half of home sales would be lost was actually extremely conservative. Apx. 0636-0639.[3]

Thus, the fundamental claim of this petition — that "JRH did not offer any fact witness to establish the existence of any historical sales or profits," petition, p. 2 (a fulcrum to its argument that the only evidence of sales and profits was inadmissible hearsay, and that there is a split of authority in the circuits on whether inadmissible hearsay can be used to establish an expert opinion) — is not true. It is simply not true, as the petition asserts, that JRH's expert Mr. Frazee "simply performed

3. While Adell makes the facile claim that JRH received huge damages for each day it was in bankruptcy, "an improper petition leaves a permanent scar, even if promptly dismissed," *In re: SBA Factors of Miami, Inc.*; 13 B.R. 99, 101 (Bankr. S.D. Fla. 1991); and, as the legislative history in S. Rep. No. 95-989 at 33 (1978) explains, "[a]n involuntary petition may put a debtor out of business if it is without foundation and later dismissed."

calculations based upon uncorroborated sale and profit information given to him by JRH," petition, p. 2. To the contrary, Mr. Shekerjian expressly described the information that was provided to JRH by Mr. Frazee as "historical information." Apx. 0635. Mr. Shekerjian expressly confirmed that the calculation of a profit margin of 17% by Mr. Frazee for future sales was consistent with his own past experience in dealing with these kinds of homes and reasonable in terms of predicting what the profit margin would have been on future lost sales precisely because it was based on "historical information," Apx. 0635; that conclusion was confirmed both by Mr. Shekerjian's 20 years of experience in the business and Mr. Shekerjian's own "understanding" of the profit margins. Apx. 0635. As a matter of fact, what Mr. Frazee did here is rather like what experts typically do. He took the historical documentation generated by JRH and arrived at his own calculation of an average profit margin and average sale price of the homes, 291 B.R. at 736, Apx. 0566-0568, Apx. 0576-0579, Apx. 0618; and then Mr. Shekerjian attested from personal knowledge that these calculations were both historically accurate and that Mr. Frazee's projection of loss of half the sales of historical margins and an average price of $1.9 million was a reasonable and indeed conservative predictor of what would happen in the marketplace. Mr. Frazee specifically took historical experience of affiliates of JRH in the pre-January, 2001 time frame (remember that JRH had been created in January, 2001 as part of an overall reorganization of the affiliated entities to concentrate sales of $1 million-plus houses); he concluded that using that experience was pertinent to establish lost future profits of JRH because JRH was using the same personnel and the same vendors and incurring the same overhead as the various affiliates had for those prior sales, Apx. 0566-0568, Apx. 0576-0579. Mr. Frazee reviewed "the cost data" and "revenue numbers" for all the affiliated entities that built houses at a price point north of

$1,000,000 as part of the documents he examined. He reviewed "a great deal of additional detail" and "detailed … cost sheets, which essentially laid out the estimated costs for the construction of homes that were constructed." Apx. 0593. He looked at the "actual costs, job costs" for each of the deals that were part of his analysis. Apx. 0616. He confirmed, in response to counsel's question, that he "analyze[d] and t[oo]k into account each and every single item of variable cost that was associated with the construction of each and every one of those homes. Apx. 0619. After he did that, Mr. Shekerjian, based on his personal experience, verified that Mr. Frazee had used historical information and validated that the profit margin on future sales was consistent with his own experience as to past profit margin, and an accurate predictor of what the future would be — indeed, Mr. Shekerjian believed it to be conservative. Apx. 0634-0639. "Perhaps the best evidence of lost profits is a comparison of the experience of plaintiff's own business before and after the interruption of its progress by the wrongful act of defendant. It has never been seriously suggested that this evidence is inadmissible to prove lost profits." I Robert L. Dunn, Recovery of Damages for Lost Profits Cases (6th ed. 2005), §5.7, p. 430. For his own part, to inform himself in his analysis, Mr. Frazee examined, among other things, as he testified, financial statements for JRH, Apx. 0566; individual profit and loss calculation documents for homes constructed by affiliates of JRH over the past five years, Apx. 0566, documents which showed Mr. Frazee the revenue that was generated, the income that was received by the company and all the costs that were associated with it. Apx. 0619. Mr. Frazee looked at market data in the area serviced by JRH, Apx. 0566-0567; multiple listing service data which captures information on real estate transactions that were occurring in the public domain, Apx. 0567; data relating to permits and housing starts at the million dollar price point in which JRH operated, Apx. 0567, and data prepared by publicly traded companies in the construction

business and filed with the SEC. Apx. 0567. Likewise, Mr. Johnson's testimony as a developer with more than 20 years experience in the market that that there had not been a downturn in the market for the sale of $1 million-plus homes was confirmed by Mr. Frazee's own personal experience. Apx. 0570.

Thus, as the Sixth Circuit concluded, "[t]he record is not as barren as Adell suggests," 439 F.3d at 262; "[Shekerjian] opined [that] Frazee's use of historical sales data from the Affiliates was a 'reasonable' predictor of JRH's potential future earnings," *id.* at 263. Shekerjian testified factually that a 50% reduction in sales over the next five years was reasonable and, if anything, conservative, given the nature of the high-end home business, because (i) the filing of the involuntary bankruptcy petition was something that people would not forget, (ii) Frazee had excluded several very expensive homes from his calculation of the average price of homes sold over the previous five years, (iii) JRH had sold no homes since the bankruptcy filing, although 50 permits for high-end homes had been issued during the six-month period, (iv) high-end sales were primarily driven by the 'ripple effect' — sales lead to people talking, which leads to more sales, so any negative publicity is potentially devastating and the negative publicity in the market was quite devastating and that JRH's own plan had been to double the number of high-end homes sold per year. Apx. 0635-0640.

Allowing Mr. Shekerjian to confirm that the historical profit margins calculated by Mr. Frazee after examining voluminous records of 40 transactions involving JRH or its affiliates was perfectly permissible so long as the underlying historical documents were made available to the opposing party for examination. There was no requirement that they be actually introduced into evidence by JRH, and Adell does not even make a claim that there is some kind of circuit split on this issue. *Zayre Corp. v SM & R Co., Inc.*, 882 F.2d 1145, 1149 (7th Cir. 1989)("[t]he record reveals that Zayre did offer to make the

underlying records available at its individual stores. SM & R does not deny this but argues that such a process would have been unduly burdensome because it would have required SM & R's counsel to visit hundreds of Zayre stores to examine the records. Such a procedure might very well have been impractical. But SM & R never filed an affidavit under Fed. R. Civ. P. 56(f) requesting a continuance to pursue discovery, or a motion for a protective order under Rule 26(c), or a motion to compel discovery under Rule 37(a), or in any other way ask the district court to require Zayre to make the underlying records more conveniently available before the district court entered summary judgment. SM & R cannot now complain about the burden that inspecting the underlying records would have imposed").

Zayre's teaching is especially instructive here because, contrary to Adell's claim in his petition that the underlying documents were never produced, there was sharp factual dispute as to whether the underlying records were indeed produced so that Adell could cross-examine with respect to them; JRH contended — and its counsel who was in charge of production represented to the Court — that each and every single record which supported the calculations as to which Mr. Shekerjian and Mr. Frazee testified had been produced; some 15 boxes of documents were produced in September, 2002, months before the December hearing date. Apx. 0584. The most powerful evidence that that is so is that in the final pre-trial order entered by the Bankruptcy Court, the Bankruptcy Court had a specific section asking for the parties to identify any evidence problems likely to arise at trial. Apx. 0185. This would have been the paradigm opportunity for Adell to complain if the documents underlying the conclusion Mr. Frazee reached, validated by Mr. Shekerjian based on his own experience, had not in fact been produced. Adell did not identify the ostensible failure to produce documents — or, for that matter, any other evidence problem — in his portion of the pre-trial order. The trial court's decision

during the hearing to reject the argument that the documents had not been produced because Adell never timely identified the problem as a problem in the pretrial order and waited until the day of the hearing to move for exclusion (Apx. 0584-0585) is the precise kind of pre-trial housekeeping duty to which trial courts are entrusted.

Indeed, in his eagerness to create an issue for certiorari that does not exist, Adell actually mischaracterizes the record. Adell says in his petition that Mr. Frazee conducted no investigation to determine whether the data supplied by JRH was in fact accurate to form his conclusion, but instead says that "Shekerjian indicated that the numbers Frazee used were those that 'we gave him'." Petition at 8. In fact, as even a cursory examination of the record reveals, Mr. Shekerjian did not use the word "numbers," he used the word "number"; and the "number" to which Mr. Shekerjian was referring was the number of houses sold by JRH or its affiliates in the $1,000,000+ price point range, the records relating to which Mr. Frazee was using to reach a conclusion as to what the historical profit margin was on the sales of these homes as a basis for predicting profit margins on lost future sales, *not* the numbers at which Mr. Frazee arrived (17% profit margin; $1.9 million average sale price) after conducting this analysis. *See* Apx. 0636-0637 ("[by JRH's counsel]: Take 35 plus homes over five years, that's seven a yea[r]. He assumes, he reduces it to four. Do you think that's reasonable, conservative? What's your view, based upon your experience with the market? [by Mr. Shekerjian]: First of all, the number went down to 30 some, 35 or so. I mean the number we gave him, the actual number was higher. He excluded a few of the large ones, just to be conservative. So the average number is what it is"). An examination of the record on this point reveals just how careful Mr. Frazee's calculation was, and how he did not rely slavishly on information provided by JRH to inform his conclusion. Among the approximate 40 transactions whose financial records Mr. Frazee examined, Mr. Frazee found several

home sales where the price was extraordinarily and atypically large or there was some other reason to exclude the data from these home sales in the analysis Mr. Frazee was conducting; including, for example, a transaction where the sale price of the house was uncharacteristically large would have skewed the approximate sale price inappropriately upwards, and thus increase the dollar amount of damages in the calculation. Mr. Frazee eliminated those "transactions" precisely to make his analysis more informative and accurate. Apx. 0575.

Adell also says that two former employees of an affiliate of JRH testified that the financial condition of JRH was ostensibly deteriorating and that JRH was having difficulty paying its trade creditors. But Mr. Shekerjian testified that these employees were disgruntled ex-employees, Apx. 0972, 0973, 0977, who had been dismissed from their positions, whose testimony was not reliable; he testified that JRH's financial picture was sound and that JRH was not having difficulty paying trade creditors, Apx. 0975; one of the ex-employees, Deborah Lee Bjorkly, claimed that there were liens on houses which had been built because of these ostensible problems, but acknowledged on cross-examination that she did not know the difference between a lien and a notice of commencement, Apx. 0905; Mr. Shekerjian testified that there were no liens, Apx. 0973 (and, as JRH's counsel pointed out in the trial court below, if there were liens, they would have been matters of public record and would surely have been introduced in evidence by Adell). Mr. Shekerjian also testified that since all of the homes that were being built would have been built in the $1,000,000-plus range and would have been owner-financed, the general financial condition of JRH would have been irrelevant to whether the homes would have been built, anyway. Apx. 0976. The trial court, by expressly crediting Mr. Shekerjian's testimony on these points, implicitly rejected — as the trial court, as the observer of the credibility of the witnesses was entitled to do — Bjorkly's and Seklar's contrary testimony.

OPINIONS BELOW

The Bankruptcy Court's decision after trial awarding JRH $6,413,230.68 in compensatory and punitive damages is reported at 291 B.R. 727. The District Court's decision affirming the Bankruptcy Court's decision and awarding JRH costs is reported at 312 B.R. 849. The Sixth Circuit's decision affirming the Bankruptcy Court's and District Court's rulings is reported at 439 F.3d 248. Adell did not seek rehearing, either before the panel which rendered the decision or en banc.

After the Bankruptcy Court issued its award, Adell, within ten days of entry of the award, liquidated Michigan assets he owned and funneled them into a Florida mansion, and then sought to invoke the benefit of Florida's homestead exemption. The Bankruptcy Court concluded that Adell was not a bona fide citizen of Florida and found further that 11 U.S.C. § 303(i) would have preempted the Florida homestead exemption even if Adell were a bona fide Florida citizen to the extent that the homestead exemption was interpreted to allow a defendant required by federal law to pay an award for abuse of the involuntary bankruptcy process to avoid paying the federal award by the expedient of changing domicile and shielding his assets in a homestead, and ordered Adell to sell the Florida house he had purchased and remit the proceeds to JRH. 298 B.R. 591. While Adell appealed this decision, he did not pursue the appeal; and Adell has now paid the award in full, with interest, which Adell did by tendering funds to the registry of the Bankruptcy Court in March, 2006.

After the Bankruptcy Court issued its order, Adell filed a voluntary Chapter 11 bankruptcy petition on his own behalf in November, 2003. Eventually Adell's Chapter 11 petition was dismissed by the Florida District Court, on appeal from the Florida Bankruptcy Court, after Adell proffered five plans of reorganization. The District Court found that the Bankruptcy

Court had erred in essentially finding that Adell had filed his petition in bad faith but not dismissing Adell's petition. Adell appealed the dismissal of his case to the Eleventh Circuit, which dismissed his appeal. These decisions are not reported. Adell has not sought certiorari to this Court from that dismissal. Adell also purported to convert his dismissed Chapter 11 case to a Chapter 7 filing, even though the linchpin of the District Court's decision was that bad faith had motivated his filing. The Florida Bankruptcy Court dismissed Adell's Chapter 7 filing; Adell appealed to the Eleventh Circuit; the Eleventh Circuit denied Adell's emergency motion for stay pending appeal; and then Adell dismissed his appeal.

Adell sought a stay pending appeal of the Bankruptcy Court's award. The District Court denied the motion for stay pending appeal notwithstanding Adell's proffered willingness to post a supersedeas bond, finding that the award was governed by Bankruptcy Rule 8017, which entrusts a stay to the discretion of the court rather than providing a stay as a matter of right upon the posting of a supersedeas bond, because "Mr. Adell's past and present manipulations of the judicial system are inimical to the public interest and continue to exacerbate JRH's injury by making recovery unjustifiably expensive and prolonged." 320 B.R. 139, 142. The Sixth Circuit also denied Adell's motion for stay pending appeal (filed by Adell because once his invocation of voluntary bankruptcy had been rejected, he could no longer claim the benefit of the automatic stay). This November 1, 2005 decision of the Sixth Circuit is not reported. Adell then filed an emergency motion for stay with this Court while the Sixth Circuit had the appeal of the Bankruptcy Court's and District Court's decisions under advisement. That motion was denied by Justice John Paul Stevens; the decision is not reported.

JRH argued to the Sixth Circuit that this post-award conduct of Adell — including, among other things, liquidating his assets to avoid paying the award, and representing to the Florida Bankruptcy Court that his appeal in the Sixth Circuit was being expedited (this to deflect the Bankruptcy Court's query whether Adell was simply not dragging out the proceedings) and thereafter opposing JRH's motion to expedite the appeal) — was an independent basis for affirming the Bankruptcy Court's and District Court's decisions. Because the Sixth Circuit affirmed on the merits, it did not consider this issue.

STATEMENT

A. *Background.*

On December 28, 2001, Adell and JRH entered into a contract for the construction of a home and sale of land to Adell (on which the home would be located) in Bloomfield Hills, Michigan for $3,030,000. Apx. 0825. In January and February 2002, Adell financed the purchase. He swore to the accuracy of the allocation that had been made in closing papers as to the respective value of the land which was being purchased ($1,750,000) and the home which was being built (the balance). Much of this amount was used to purchase the land. Apx. 0710. JRH's principal John Shekerjian testified that a certain amount of the money was held in trust for Adell to be used in connection with construction of the home, and denied that the money was not in fact held in trust. Apx. 0246-0247. JRH began preparing the property for construction. The property experienced a not-uncommon water problem — a hole was dug for excavation, and it filled with water — but JRH had dewatering take place and this problem was solved. But Adell expressed dissatisfaction with the progress which was being made on constructing the property; he fired JRH from the job site; he told JRH that his brother-in-law was going to build the house; and he claimed that JRH had cheated him by overcharging him for the land,

even though he had previously sworn to the accuracy of the allocation. Apx. 0653-0654. Adell also had a lawyer write a letter on May 31, 2002, threatening JRH with criminal prosecution and demanding that JRH refund Adell all of the money that Adell had paid to JRH, and eliminate the mortgage on the property which Adell had taken, and pay JRH his costs and attorney fees. Apx. 0813.

B. ***Events Leading to the Involuntary Bankruptcy Case.***

After receiving the threat, JRH and its counsel, E. Michael Morris, asked for a meeting, which was attended by, among others, Adell and the lawyer who had threatened JRH with criminal prosecution. Adell pointedly asked John Shekerjian, JRH's principal, whether JRH could take the hit to its reputation which would be associated with the filing of a bankruptcy petition and repeated the threats in the letter. Apx. 0473, Apx. 0471. At this meeting and in subsequent correspondence, JRH and its counsel specifically denied that Adell had been overcharged for the land and pointed out that comparable land sales were consistent with the price to which Adell had agreed (in fact, JRH had invested more than the $1,750,000 sale price of the land in the land); specifically disputed liability to Adell; and specifically warned Adell that an involuntary bankruptcy petition would be precipitous, improper and would work vast harm to JRH, for which JRH would seek suitable redress. Apx. 0471-0472; Apx. 0817, 0818, 0819. Adell filed a state court lawsuit after this meeting, accusing JRH and Mr. Shekerjian of fraud and asserting other claims. Apx. 0719. Prior to the filing of the involuntary bankruptcy petition, JRH and Mr. Shekerjian answered the state court complaint; denied the material allegations of liability; and counterclaimed against Adell for breaching the contract to buy the land and home. Apx. 0747-0765.

C. *The Proceedings Below.*

1. The involuntary bankruptcy case.

On June 24, 2002, Adell commenced the involuntary bankruptcy case against JRH under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 301 *et seq*. JRH moved to dismiss the involuntary case on July 1, 2002. The Bankruptcy Court set a hearing on the motion for July 15, 2002. Before the Bankruptcy Court conducted its hearing on July 15, 2002 to determine whether the case was even suitable for treatment as an involuntary bankruptcy matter, Adell (a) threatened one trade creditor that if he did not join the involuntary bankruptcy petition, Adell would see to it that he was not paid what he was owed; (b) promised another trade creditor that if she joined in the petition, she would not have to pay anything; (c) boasted to those creditors variously that he was very wealthy and owned a television station and an exposition center; and (d) gave false information to a publicist he hired for the express purpose of publicizing the involuntary filing, including providing the names of nine ostensibly dissatisfied customers of JRH whom he asked the publicist to have the media contact and telling the publicist that JRH had given payoffs to trade creditors to try to forestall the filing. The filing was reported in the local media. Adell's publicist falsely told each media representative that it had an "exclusive" story on its hands. Apx. 0527-0528; Apx. 0500; Apx. 0834; Apx. 0836; Apx. 0984-0989.

On July 15, 2002, the Bankruptcy Court dismissed the involuntary bankruptcy petition. Adell never appealed the dismissal.

2. Proceedings under 11 U.S.C. § 303(i).

11 U.S.C. § 303(i) contemplates that after dismissal of an involuntary bankruptcy petition, the Court retains jurisdiction to conduct hearings to determine whether an award of attorney

fees and costs, compensatory and punitive damages is available. Attorney fees and costs are awardable regardless of whether the dismissed petition was filed in good faith; compensatory and punitive damages are awardable if a filing is made in bad faith.

Following discovery, the Court conducted a hearing on JRH's claim of entitlement to compensatory and punitive damages and attorney fees and costs in December, 2002 and January, 2003. John Shekerjian testified about Adell's threats; about the harm that JRH had suffered and would in the future suffer because of the filing of the involuntary bankruptcy petition, and, in particular, how the filing had devastated JRH's reputation. He reviewed calculations made by Thomas Frazee, JRH's outside damages expert, he confirmed that JRH and its affiliates had historically experienced a 17% net profit margin; that Mr. Frazee's calculation of the volume of lost sales over the next five years was accurate, and, indeed, conservative as to amount; he confirmed that he had provided Mr. Frazee with historical information to allow Mr. Frazee to make his calculations; he testified that a 17% profit margin was accurate, based on his understanding and experience, in predicting the profit margin on lost future sales by JRH. Apx. 0634-0640.

David Johnson was a real estate developer who had developed residential communities, including super-lux communities, for more than 20 years in JRH's market areas. He testified that in his experience, the filing of the involuntary bankruptcy petition had definitely harmed JRH's ability to sell houses, because the very filing of an involuntary bankruptcy petition clouded the reputation of JRH and caused prospective purchasers to seek out other super-lux builders who were not affected by this taint to reputation. He testified that the market

for super-lux homes remained strong despite the impact of the downturn of the economy on sales at other price points. Apx. 0507, 0510-0511.

Robert Clark was a trade creditor of JRH who testified that he had been threatened by Adell that if he did not join the involuntary bankruptcy petition, Adell would be in charge of the distribution of assets in the bankruptcy and he would see to it that Clark would not be paid. Apx. 0527-0528.

Cynthia Weaver of EW Kitchens testified that EW was a trade creditor of JRH; that Adell identified himself as a very rich man who owned a television station and an exposition center, and told her that she could verify that this was so with Adell's lawyer; Adell's lawyer in fact verified that information in response to Weaver's request.

Michael Layne of the Marx, Layne advertising agency testified that Marx, Layne had been hired by Adell for the express purpose of publicizing the involuntary bankruptcy petition, 291 B.R. at 732, Apx. 0535; Marx, Layne in fact notified the two major Detroit newspapers and Detroit's primary business trade publication; that Marx, Layne had falsely told each of these Detroit media outlets that they were getting an "exclusive" story about the involuntary petition, presumably to maximize the prospects of coverage, Apx. 0834, 0836; that Adell had given Marx, Layne information that there were nine dissatisfied customers of JRH whom the media should contact and that Adell had told Marx, Layne that JRH had engaged in "payoffs" to forestall the filing of the involuntary bankruptcy petition, Apx. 0544-0545 (in fact, no payoffs were made).

Jean McIntyre and Larry Gainer, two of the nine ostensibly dissatisfied customers identified by Adell to his publicist Marx, Layne and, in turn, identified by Marx, Layne to the media,

testified that they were pleased with the work that JRH had done and that they had no complaints or dissatisfaction, and had no idea how Adell claimed to identify them as disgruntled or dissatisfied with JRH in some way. No customer testified to any dissatisfaction. Apx. 0984-0989.

Michael Morris, JRH's counsel, testified to the meeting that took place prior to the filing of the involuntary bankruptcy petition to the threats made by Adell and to the fact that JRH disputed liability in the meeting and in correspondence. Apx. 0469-0473.

Thomas Frazee, JRH's outside economic expert, testified that he had examined historical information of JRH and its affiliates, including documents given to him by JRH which reflected each and every cost associated with building the homes built by JRH and its affiliates over the prior five years at price points north of $1 million, to determine the average profit margin of JRH and its affiliates and average sale price of JRH and its affiliates with respect to these transactions, this to reach a conclusion on how JRH would have performed in the future with respect to sales lost as a result of the bankruptcy filing; that he excluded certain transactions as being at too high dollar a volume, which would skew the average calculations in a way that Frazee believed inappropriate; and that he had examined financial statements of JRH, had independently consulted the multiple listing service, looked at housing starts from other builders, examined public records filed with the SEC of similar builders, spoken with area brokers about market demand and verified that the housing market for houses north of the $1 million price point had not been affected by downturns in the local economy. Apx. 0566-0568; Apx. 0576-0579; Apx. 0618; Apx. 0570.

D. *The Award.*

On April 25, 2003, the Bankruptcy Court entered its award in the amount of $6.413 million in JRH's favor.

REASONS FOR DENYING THE PETITION

A. *General Rules Relating To The Grant Of Certiorari Petitions.*

As this Court held in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), petitions for certiorari will only be granted "in cases involving the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." In the words of Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), certiorari jurisdiction is "not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." What is more, where a decision is dependent on a factual finding, not a ruling of law with respect to which there is disagreement among circuit courts, certiorari is inappropriate; in the absence of extraordinary circumstances, it is the "settled practice" of this Court to accept "factual determinations in which the district court and the court of appeals have concurred." *Brantl v Finkel*, 445 U.S. 507, 512 (1980).

B. *The Decision In This Case Was Highly Factually Dependent And Does Not Implicate Any Circuit Conflicts.*

Adell would have this Court conclude that there is an issue ripe for consideration on certiorari on the state of this record: whether an expert conclusion based on inadmissible hearsay documents whose content JRH ostensibly made no effort to prove, is, standing alone, enough to establish the fact that the expert has concluded. That is not what this record presents at all:

— For starters, the facts (what JRH's affiliates' historical profit margins were, what the average price of homes was historically and what future losses JRH would incur by virtue of the filing of the bankruptcy petition) were not just testified to by Mr. Frazee. Mr. Shekerjian also testified to these facts, and he was subject to full cross-examination.

— Mr. Shekerjian testified that he provided historical information to Mr. Frazee to inform Mr. Frazee's analysis, and Mr. Frazee likewise testified that he was provided with documents showing each and every item of cost and revenue which he used to perform his analysis. These documents were produced to Adell's counsel and so Adell had a full and fair opportunity to cross-examine both Mr. Shekerjian and Mr. Frazee about them. Analyzing these documents was a more than appropriate way to calculate lost future profits of JRH.

— Indeed, for that matter the expert here did not even, as the Sixth Circuit pointed out, use the underlying documents showing the historical profit margins of JRH's affiliates to prove what JRH's affiliates' profit margins on house sales were — so the expert's testimony was not even classic hearsay. They were simply used to make a prediction about what the sales price and profit margins on future lost sales of JRH.

On this highly factual record, this case does not, therefore, remotely implicate any ostensible circuit conflict on the issue of whether expert testimony based on inadmissible hearsay documents can, standing alone, establish a fact. Where a principal of a business opines as to facts and those facts are based upon a review of documents, the principal's factual conclusion is admissible so long as the underlying documents are made available for examination. *Zayre*, *supra*. Under Rule 703, the documents need not be admitted into evidence; indeed, they need not even be "admissible" in evidence, so long as they are "of a type reasonably relied upon by excerpts in the particular

field in forming opinions or inferences upon the subject." Experts rely on business records of businesses all the time in reaching their conclusions; they would in fact be admissible under the well-established exception to the hearsay rule contained in Rule 803(6); but Rule 703 makes clear that they need not even be admissible in evidence for experts to rely upon them in reaching their conclusion. *See, e.g.*, *International Adhesive Coating Company, Inc. v. Bolton Emerson International, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988)("Vesey testified that he derived his damage estimates by reviewing International's business and financial records and through interviews with company personnel. We think it obvious that these are sources of information normally and reasonably relied upon by accountants ..."); *Local 159, 342, 343, 344 & 444 v. Nor-Cal Plumbing, Inc.*, 1999 U.S. App. LEXIS 17968 at *28 ("[b]ecause the district court determined that the data was of a type upon which accountants reasonably rely in forming their opinions, it did not err in permitting the experts to rely on this data in the course of their testimony or in admitting the data for the limited purpose of explaining the basis of their opinions"); *South Central Petroleum, Inc. v. Long Brothers Oil Co.*, 974 F.2d 1015, 1019 (8th Cir. 1992)("the district court expressly limited the admission to the expert's opinion and did not admit the information on which the expert based his opinion. Moreover, Long Brothers does not dispute that their opponent's expert based his opinion on information reasonably relied upon by experts in the field").

Adell simply has not, therefore, remotely demonstrated that in this highly factual context, this Court should make the "commitment of scarce judicial resources" that a grant of certiorari represents. *Oklahoma City v. Turtle*, 471 U.S. 808, 816 (1985).

C. *There Is No Conflict Among Circuits, Anyway.*

Even if this certiorari petition squarely implicated the issue of whether an expert could testify to a fact based solely on inadmissible hearsay, without more — and it simply does not on this record, which is why the petition should be denied — there is no conflict, anyway.

Adell argues that the First and Sixth Circuits have somehow split from the Fifth, Seventh, Eighth, Ninth, and Tenth Circuits on the requirements of expert testimony. Adell cites only one case in the First Circuit for this alleged split; in turn, the case at issue in this appeal is the only Sixth Circuit authority that Adell cites to demonstrate that there is a split.

Neither of these two cases in the First and Sixth Circuits represent any departure from the prevailing law of the other circuits to which Adell refers. In *International Adhesive Coating Co., Inc. v. Bolton Emerson Intern., Inc.*, 851 F.2d 540, 545 (1st Cir. 1988), an accounting expert reviewed a company's financial records and prepared a report estimating lost sales. A party attempted to argue that the expert was obligated to present "invoices, statements, documents, breakdown or … supporting data" to support the damages he testified about. *Id.* at 545. The court pointed out that such an argument ignores Federal Rule of Evidence 705, which states:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise.

The court also noted Federal Rule of Evidence 703, which provides:

> If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

> admissible in evidence in order for the opinion or inference to be admitted.

In the case at bar, Mr. Frazee examined business records, which are of course of the type often relied on by experts to make conclusions. The *International Adhesive* court held that the expert's testimony "did not have to establish the validity of the central, disputed factual claims in this case in order to have a factual basis and be admissible." *Id.* at 545. In making its holding, the court stated that any issues regarding the underlying documentation went to the weight of the testimony, not its admissibility; opposing counsel had the opportunity to expose any weaknesses through cross-examination. *Id.* at 544. Subsequent opinions by the First Circuit Court of Appeals make it clear that the First Circuit did not "abandon its critical gatekeeper function in favor of admitting hearsay through expert testimony." *See Univ. of Rhode Island v. A. W. Chesterton Co.*, 2 F.3d 1200, 1218 (1st Cir. 1993)("Rules 703 and 705 do not afford automatic entitlements to proponents of expert testimony"). So the First Circuit simply did not violate the hearsay rule by allowing the expert's testimony; and, indeed, the First Circuit has made clear that a proponent of expert testimony cannot rely upon a hearsay fact to establish the truth of the fact through the expert.

The Sixth Circuit Court of Appeals followed this well-accepted approach in the case at bar. Mr. Frazee used historic sales data from the past five years to estimate future lost profits. *Id.* at 263. Adell argued that the bankruptcy court could not accept the expert's testimony without actual evidence in the record of the sales data the expert examined. *Id.* at 263. The court disagreed and held that the expert's testimony was admissible under Federal Rules of Evidence 703 and 705. *Id.* at 264. "[A]n opposing party who would challenge the facts underlying the expert's opinion must do so by cross-examination." *Id.* at 264.

This position of the First and Sixth Circuit is consistent with every other circuit in the country, including those cited by Adell. *See Robinson v. Missouri Pac. R. Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994)("[t]he burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion"); *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1019 (8th Cir. 1992)("[a]ny weaknesses in the factual underpinnings of (the expert's) opinion go to the weight and credibility of his testimony, not to its admissibility"); *Walker v. Soo Line R. Co.*, 208 F.3d 581, 587 (7th Cir. 2000), *cert. denied*, 531 U.S. 930 (2000)(in connection with an expert opinion, "[t]he accuracy and truthfulness of the underlying [educational] history is subject to meaningful exploration on cross-examination and ultimately to jury evaluation"); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 252 (5th Cir. 1990)(holding that an expert opinion is admissible despite opposing counsel's argument that the expert testimony relied on hearsay); *U.S. v. Elliott*, 91 F.3d 156 (9th Cir. 1996), cert. denied, 519 U.S. 987 (1996)(holding that the government did not have to introduce report into evidence that expert relied on).

Adell misconstrues a range of cases and ignores the Federal Rules of Evidence in his attempt to manufacture a circuit split. A typical example is *Viterbo v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987), which Adell claims is in direct conflict with *International Adhesive* and the Sixth Circuit's holding in this case. In *Viterbo*, an expert physician gave his opinion regarding the cause of a patient's illness. *Id.* at 423. The expert's opinion relied on the patient's oral statements that he experienced certain symptoms, but the expert failed to inquire into the patient's family history. *Id.* at 423. If he would have done so, the expert would have found a family history of depression and hypertension; the patient was also experiencing those symptoms, indicating that hereditary traits could be the cause of the illness

instead of the cause the expert named. *Id.* at 423. The expert also relied on tests which could have supported conclusions other than the one arrived at by the expert. *Id.* at 423. All that *Viterbo* held was that because the expert did not even examine medical records, conduct medical tests and had no scientific literature to back up his opinion, his testimony was of no use to the jury; the expert's testimony was simply the patient's "testimony dressed up and sanctified as the opinion of an expert." *Id.* at 424.

This does not conflict in any way with the holding of the Sixth Circuit here or the holding in *International Adhesive*. In the case at bar, Mr. Frazee did exactly what an expert is supposed to do: he used his accounting expertise to examine each and every item of cost and revenue associated with sales of JRH's affiliates to reach a conclusion as to what the average profit margin was on these historical sales and what the average sale price was for these sales, using documents of those transactions to conduct his analysis. He did not simply take Mr. Shekerjian's opinion with respect to what historical sales profit percentage and historical prices had been and wrap that opinion into an "expert" package. And *Viterbo* is not a case in which the expert testified based on records but the records were not made available for examination or admitted into evidence; to the contrary, one of the reasons why the Court excluded the doctor's expert opinion in *Viterbo* is that he examined no records at all.

Similarly, *International Adhesive* did not hold that an expert could rely upon the hearsay assertion of a fact to prove the fact just by wrapping his testimony in the mantle of "expert" opinion; nor did the Sixth Circuit in this case. Indeed, the Sixth Circuit carefully pointed out that Mr. Frazee's testimony was not used to establish what JRH's affiliates' past profits were, based on his examination of documents.

Adell likewise misconstrues the Seventh Circuit's holding in *Matter of James Wilson Assocs.*, 965 F.2d 160 (7th Cir. 1992) to create a conflict where none exists. In *James Wilson*, the value of a building was at issue in order to determine a secured creditor's interest. *Id.* at 172. In an effort to prove that the building was worth much less than a reorganization plan assumed, an expert architect planned to testify about the building's physical condition; however, the only source for the expert's knowledge was a report prepared by a consulting engineer. *Id.* at 172. The court rightly held that the expert's testimony was pure hearsay and would not be admitted. *Id.* at 173. The architect was not an engineer and the engineer — to the Seventh Circuit's puzzlement — never testified; instead, the architect purported to testify to the engineer's conclusions. The court's conclusion that this was impermissible was hardly remarkable. The *Wilson* Court did say, like the other circuit's have said, that an expert witness "is allowed to explain the facts" underlying his opinion, "even if they would not be independently admissible." *Id.* at 172-73.

The testimony of the experts in *International Adhesive* was not, as the Sixth Circuit pointed out in this case, introduced in order to prove the underlying historical sales data, *i.e.*, what JRH's affiliates had experienced. Mr. Shekerjian's testimony proved that; Adell never objected to Mr. Shekerjian's testimony, and Adell had the documents informing his conclusion to cross-examine with. The expert testimony instead was put forth in order to prove future lost profits of JRH; the experts used underlying financial data as one of many tools to determine the amount of damages. The Sixth Circuit approvingly cited *James Wilson* and acknowledged that "expert testimony may not be used to establish underlying facts not otherwise in evidence." 439 F.3d at 264. But as the Sixth Circuit stated, there was no independent need to establish the past profits of JRH's affiliates, and thus the expert's testimony was only used to demonstrate

JRH's future damages. *Id.* at 264. There was no hearsay violation and consequently no conflict among the circuits.

Adell also cites *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722 (10th Cir. 1993). However, a review of *TK-7 Corp.* indicates that the Tenth Circuit does not disagree with the Sixth Circuit's or First Circuit's reasoning, either. In *TK-7 Corp.*, a party produced an expert to testify as to future lost profits in Great Britain. *Id.* at 730. This testimony relied on another professional's market report projecting that the company would be able to capture 5% of a certain segment of the market in Great Britain. *Id.* at 731. However, the expert had no other basis for his testimony other than these future sales projections performed by *another* expert, and admitted that he had no expertise regarding sales projections in Great Britain. *Id.* at 731, 732. The court thus excluded the expert's testimony because it simply repeated the findings of another expert. *Id.* at 732. This failure to demonstrate any independent basis for the expert opinion gave the opposing party little opportunity for meaningful cross-examination. *Id.* at 732. By contrast, here, Mr. Shekerjian confirmed the past profits of JRH's affiliates; the documents which informed Mr. Sherkerjian's conclusion were available to Adell for Adell to cross-examine; and so the Sixth Circuit did nothing in conflict with any other circuit.

Unlike *TK-7 Corp.*, the testimony of experts in *International Adhesive* and this case did not simply parrot information the experts received from someone else. The experts in both cases used financial data to do what experts do: to arrive at *independent* conclusions that were not simply read from a market report prepared by another expert. This independent analysis gave the opposing parties ample opportunity to cross-examine the testifying experts concerning the methodology used to arrive at their opinions. By the Tenth Circuit's own statement, it was a lack of opportunity to cross-examine the expert whose finding

the testifying expert parroted that distinguished *TK-7 Corp.* from the usual case where the expert's "validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." *Id.* at 732.

The First, Sixth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits are all in agreement that an expert's testimony does not have to establish the validity of disputed claims in order to be admissible; it is only where a party uses expert testimony to establish underlying facts not otherwise in evidence that the courts bar the expert's conclusions. Thus, the authority relied on by the Sixth Circuit Court of Appeals in this case on appeal is supported by a national consensus, and does not depart from any other circuits' holdings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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